

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

MONTGOMERY CARL AKERS,

Plaintiff,

vs.

JAMES KESZEI, *et al.*,

Defendants.

Case No. 2:07-cv-00572-JCM-GWF

**ORDER AND  
FINDINGS AND  
RECOMMENDATIONS**

Motion for Sanctions (#239)

On February 16, 2010, Magistrate Judge Foley issued an order denying Plaintiff Montgomery Carl Akers' Motion for Sanctions (#239) against Defendant Nicholas Voulgaris. (#250).<sup>1</sup> The Court found that Plaintiff had not offered sufficient evidence to demonstrate that Voulgaris had not adequately responded to Plaintiff's discovery requests and therefore sanctions were not merited at that time. (*Id.*) Akers filed a motion for reconsideration<sup>2</sup> of the Court's order denying Plaintiff's request for sanctions. (#253). As part of the motion, Plaintiff attached additional evidence that he had not previously submitted to the Court in support of his request for sanctions against Defendant Voulgaris. (*Id.*) The . . .

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<sup>1</sup> Plaintiff filed his motion for sanctions in conjunction with a motion for judgment on the pleadings. (*See* #239). As a result, the Court's order denying the motion for sanctions was combined with a recommendation that Plaintiff's Motion for Judgment on the Pleadings should be denied. (#250).

<sup>2</sup> While Plaintiff's motion was entitled "Plaintiff's Response to the Report and Recommendations by the Magistrate Judge Regarding Plaintiff's Motions Doc. 220 and 239," the motion did not object to Judge Foley's recommendation that Plaintiff's motion for judgment on the pleadings be denied. (*See* #253). Instead, Akers requested that Judge Mahan reconsider Magistrate Judge Foley's order denying Plaintiff's motion for sanctions. (*Id.*) As a result, Judge Mahan treated the "Response to the Report and Recommendation" as a Motion for Reconsideration of the Order Denying Plaintiff's Motion for Sanctions. (#254 at 1).

1 evidence consisted of portions of a hearing transcript from Akers' criminal trial.<sup>3</sup> (*Id.*) In the criminal  
2 trial transcript, Voulgaris appears to testify under oath that he is in possession of various documents  
3 related to the present action. Upon review of Plaintiff's discovery requests, Judge Mahan found the  
4 documents that Voulgaris testified to being in his possession during the prior criminal trial appear to be  
5 responsive to the discovery requests served upon him by Plaintiff in the current action. (*Id.*) In light of  
6 this evidence, Judge Mahan remanded the Motion for Sanctions (#239) to Magistrate Judge Foley for  
7 reconsideration in conjunction with the transcripts. (#254).

8 The Court will now reconsider the merits of Plaintiff's Motion for Sanctions (#239).

### 9 DISCUSSION

10 Plaintiff requests that this Court issue sanctions against Defendant Nicholas Voulgaris due to  
11 Voulgaris' repeated refusal to substantively respond to Plaintiff's discovery requests and refusal to  
12 comply with the Court's prior orders compelling Voulgaris to produce discovery. (#239). In his  
13 motion, Plaintiff states that Voulgaris has responded to Plaintiff's discovery requests. (*Id.*) However,  
14 Voulgaris' affidavit in response simply states that Defendant is not in possession or control of any  
15 documents related to Plaintiff's discovery requests. (#243 at 3-4). However, Voulgaris testified at  
16 Akers' criminal trial that Voulgaris was in possession of numerous documents. Based on Voulgaris'  
17 testimony, it is likely that the documents discussed may be responsive to Plaintiff's discovery requests.  
18 In light of this testimony, the Court finds that Voulgaris' simple statement that he does not possess  
19 any of the requested documents is not a sufficient or credible response to Plaintiff's discovery requests.

20 It is unclear to the Court what documents are in Defendant Voulgaris' possession. However, by  
21 choosing not to respond to Plaintiff's request for sanctions, Voulgaris has failed to rebut Plaintiff's  
22 allegation that he is in possession of the documents. Under LR 7-2(d), "[t]he failure of an opposing  
23 party to file points and authorities in response to any motion shall constitute a consent to the granting of  
24 the motion."

25 Voulgaris has consistently chosen not to participate in this litigation. On August 7, 2009,  
26 Plaintiff filed a Renewed Motion to Compel Responses for Production of Documents Served Upon  
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28 <sup>3</sup> *United States v. Akers*, 2:04-cr-20089-KHV-JPO (D. Kan. 2006).

1 Defendant Nicholas Voulgaris. (#188). Voulgaris did not oppose the motion and the Court ordered  
2 him to respond to Plaintiff's First Set of Request for Production with all requested documents in his  
3 possession, custody or control by September 18, 2009. (#195). On September 25, 2009, Plaintiff filed  
4 a motion for an order to show cause, alleging Voulgaris had still not responded to Plaintiff's discovery  
5 requests and had failed to comply with the Court's order. (#204). Again, Defendant did not file a  
6 response to Plaintiff's motion. The Court granted Plaintiff's motion and ordered Defendant Voulgaris  
7 to respond, without objection or claim of privilege, to Plaintiff's First Set of Request for Production  
8 with all requested documents in his possession, custody or control by December 21, 2009. (#220). The  
9 Court also notified Defendant that if he failed to comply with the order, the Court would impose  
10 sanctions, potentially including potential monetary sanctions or the striking of Defendant's Answer.  
11 (*Id.*)

12 When Defendant failed to respond to the discovery requests with more than a statement that he  
13 did not have any of the documents requested, Plaintiff filed the present motion for sanctions. (#239).  
14 Voulgaris failed to oppose the motion and did not respond to allegations that he has previously testified  
15 that he is in possession of documents responsive to Plaintiff's discovery requests. The Court finds that  
16 Defendant Voulgaris has consistently failed to comply with Court orders, failed to properly respond to  
17 discovery requests and consented to the imposition of sanctions by choosing not to respond to  
18 Plaintiff's motion. Accordingly,

19 **IT IS HEREBY ORDERED** that Plaintiff's Motion for Sanctions against Defendant Nicholas  
20 Voulgaris (#239) is **granted**.

#### 21 **RECOMMENDATION**


22 **IT IS HEREBY RECOMMENDED** that Defendant Nicholas Voulgaris' Answer (#87) should  
23 be **stricken** based on Defendant's failure to comply with Court orders, failure to properly respond to  
24 discovery requests and consent to the imposition of sanctions by choosing not to respond to Plaintiff's  
25 motion for sanctions (#239).

#### 26 **NOTICE**

27 Pursuant to Local Rule IB 3-2, any objection to this Finding and Recommendation must be in  
28 writing and filed with the Clerk of the Court within fourteen (14) days. The Supreme Court has held

1 that the courts of appeal may determine that an appeal has been waived due to the failure to file  
2 objections within the specified time. *Thomas v. Arn*, 474 U.S. 140, 142 (1985). This circuit has also  
3 held that (1) failure to file objections within the specified time and (2) failure to properly address and  
4 brief the objectionable issues waives the right to appeal the District Court's order and/or appeal factual  
5 issues from the order of the District Court. *Martinez v. Ylst*, 951 F.2d 1153, 1157 (9th Cir. 1991); *Britt*  
6 *v. Simi Valley United Sch. Dist.*, 708 F.2d 452, 454 (9th Cir. 1983).

7 DATED this 5th day of August, 2010.

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10 **GEORGE FOLEY, JR.**  
11 **UNITED STATES MAGISTRATE JUDGE**  
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